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No. 92-549

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DON ATER - - - - - - - - - Petitioner

versus

DAVID ARMSTRONG and
LEON E. JONES, SR. - - - - Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the District Court and Circuit Court correctly held that Kentucky Revised Statute 189.570, prohibiting standing in a highway for distribution of literature but excepting solicitation of contributions, was based on the type of activity rather than content or view of the speech, was narrowly tailored to serve a significant government interest, leaving open ample alternative channels of communication, and thus did not violate the Petitioner's rights under the First and Fourteenth Amendments.

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The Respondents, David Armstrong and Leon E. Jones, Sr., respectfully oppose issuance of a writ of certiorari for the reasons contained in this Brief.

COUNTERSTATEMENT OF THE STATEMENT

Petitioner, Don Ater, in his statement of the case, set forth the outline of the case in essentially correct detail. He has, however, failed to mention some matters relevant to the issues presented. Without repeating those matters correctly stated by Ater, Respondents ask this Court to note the following points.

The Kentucky statute attacked by Petitioner in this case is actually a subsection of a much larger chapter of

the Kentucky Revised Statutes (KRS) on traffic regulations and related matters. KRS 189.570 is the section of that chapter regulating various aspects of pedestrian conduct in and around highways and roadways. KRS 189.570 generally prohibits all pedestrians from entering the roadway except to cross it. KRS 189.570(9), for instance, states that "no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard."

Other subsections of KRS 189.570 provide other prohibitions to pedestrians in and around roadways for the mutual safety of those pedestrians and motorists. KRS 189.570(12), for instance, makes it unlawful for a pedestrian to walk along or upon a roadway if there is an adjacent sidewalk. KRS 189.570(13) requires a pedestrian to walk "only on the shoulder, as far as practicable from the edge of the roadway" where no sidewalk is available.

When KRS 189.570 is viewed as a whole, it is clear that it is a typical comprehensive state traffic regulation designed to keep motorists and pedestrians safely apart. Just as surely as gasoline and fire cannot be carelessly allowed in the same space at the same time, the proximity of pedestrians and motor vehicles on public roadways is an area where government may impose reasonable time, place and manner restrictions. This is true even if the conduct is protected and the location is a traditional public forum, such as a public street.

Ater does not seem to allege that the statutory subsection in question was created to injure him. Indeed, it appears that KRS 189.570 had been the law for years

before its application to Ater's organization was first raised.[1] Just as surely, these Respondents did not create that legislation. They are local county officials charged by Kentucky law with enforcing state statutes, such as the regulation at issue, in the most urban and populous county in the state.

On April 28, 1987, Ater wrote a letter to then Jefferson County Police Chief Crouch,[2] on stationery of the "Invisible Empire Knights of the Ku Klux Klan," and signed by Ater as Grand Dragon—Realm of Kentucky. The letter referred to an article apparently published five months earlier in the Courier Journal newspaper, in which Crouch was allegedly quoted as saying the County Police would be beginning a crackdown in enforcing the law banning people from standing on a highway to solicit business or employment.[3]

Ater's letter goes on to state that the members of the Ku Klux Klan (hereafter "KKK") did not feel the law applied to them and that they desired to stand at intersections and streets to distribute literature to the public.

Crouch wrote back to Ater, stating that he felt the statute did apply to Ater's organization. Crouch further

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[1]Ater initially included a claim against Respondents of selective enforcement but voluntarily dismissed that claim at the District Court level. He had also initially claimed in his Complaint that the statute did not bar his proposed conduct. He also chose not to pursue that claim on appeal.

[2]Crouch was an initial defendant in this case but Jones was substituted as a party after the retirement of Crouch.

[3]KRS 189.570(20) provides that "no person shall stand on a roadway for the purpose of soliciting employment or business from the occupant of any vehicle."

advised Ater that the law would not apply to someone standing on the sidewalk distributing literature. A later response by Crouch to the ACLU, mentioned by Petitioner in his Petition, describes the KRS 189.570(21) exception applicable to persons allowed to stand on a highway for the purpose of soliciting contributions, designated by warning devices such as flashing lights.

The District Court, holding that the statute was content-neutral and narrowly tailored to achieve legitimate ends, upheld the statute. The District Court further noted that there are ample alternative channels of communication.

The Sixth Circuit affirmed the District Court, having determined that the statute, even if arguably underinclusive, was a reasonable time, place and manner restriction which promoted the legitimate goal of roadway safety and prohibited no more activity than was considered necessary. The Sixth Circuit later denied Ater's Petition for rehearing en banc.

ARGUMENT

I. The Opinion of the Sixth Circuit Does Not Conflict With This Court's Decision in *ISKCON* v. *Lee*.

The recent decision by this Court in *International Society for Krishna Consciousness* v. *Lee (ISKCON)*, 112 S.Ct. 2711 (1992) supports rather than conflicts with the decisions by the District Court and the Sixth Circuit.

Ater's argument here somehow concludes that this Court's decision in *ISKCON* stands for the proposition that solicitation is the most dangerous form of speech. Built on that premise, Ater concludes that the Kentucky statute, which prohibits most other activity by pedestrians in the highway but allows an exception for solicitation of

contributions in areas designated by flashing lights or other warning devices, is somehow unconstitutionally irrational.

Ater, of course, ignores the fact that even if the solicitation of contributions exception is struck down, Ater's proposed conduct will still be prohibited. Striking down the exception would leave in place the general prohibition against pedestrians being on the highway except to cross it.

Essentially, Ater takes a position that if his type of proposed conduct (i.e., distributing literature) is not excepted from the general prohibition, then a different type of conduct of others (i.e., solicitation of contributions) should likewise not be excepted. Ater thus takes the reverse of the argument in *ISKCON,* where the prohibitions and not the exception were attacked. *Id.*

Ater's theory would severely damage a multitude of organizations which derive a very substantial portion of their operating budgets by solicitation from the highways, using the statutory traffic warning devices. On the other hand, Ater's theory brings him no closer to his desired goal of distribution of literature from the highway.

It should be noted that, under KRS 189.570, Ater's group could presumably distribute literature from a sidewalk or curb adjacent to a highway. The KKK could also presumably be in the highway, using the statutory warning devices, to solicit contributions. This is not the sort of logic or legislative scheme addressed in *ISKCON. Id.*

ISKCON is obviously distinguished from the present case by this Court's determination that the site regulated, an airport terminal, is not a traditional public forum. *Id.* at 2706-2708. This Court specifically found it unnecessary to determine if the regulations at issue there could survive

under the strict scrutiny applicable to public fora. See *Id.* at 2706 n. 4. This Court did state, however, that the regulation in question "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 2705-2706.

This Court went on to state in *ISKCON* that the challenged regulations there need only satisfy a requirement of reasonableness, reiterating its position in *United States* v. *Kokinda*, 497 U.S. 720, 110 S.Ct. 3115, 3124, 111 L.Ed. 2d 571 (1990) (plurality opinion) (quoting *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 105 S.Ct. 3439, 3452, 87 L. Ed. 2d 567 (1985)) that "the restriction 'need only be reasonable; it need not be the most reasonable or the only reasonable limitation.'" *Id.* at 2708.

Citing *Kokinda*, the Sixth Circuit noted that this Court had held that a content-neutral distinction could be made between solicitation and distribution of literature and that the failure of the Postal Service to bar other forms of expressive conduct did not lead to the conclusion that the regulation was content based. *Ater* v. *Armstrong*, 961 F.2d 1224, 1228 n.4 (6th Cir. 1992).

The Sixth Circuit, citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 800, 109 S. Ct. 2746, 2758, 105 L.Ed.2d 661 (1989) noted that this Court had held:

> So long as the means chosen are not substantially *broader* than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's

> agreement with the responsible decisionmaker concerning the most appropriate method for promoting a significant government interests" or the degree to which these interests should be promoted. (emphasis added) (alteration in original) (quoting *United States* v. *Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)
>
> *Id.* at 1229.

Having abandoned or failed to make arguments that KRS 189.570 either does not or should not apply to the KKK's effort to distribute literature, Petitioner is left with only the argument that the statute is underinclusive and therefore not narrowly enough tailored.

II. The Statutory Exception Which Ater Challenges Is Content Neutral and Narrowly Tailored to Serve a Legitimate Governmental Interest.

It is critical to note at this point in the Appellate process that Ater has relegated his position to an attack on KRS 189.570(21). Ater is not, procedurally, attacking the body of the statute which creates the prohibitions to pedestrian activity on the highways. He is, instead, attacking a single exception to those general prohibitions, found in KRS 189.570(21). See Petition, p.i. This exception dealing with those soliciting contributions rather than distributing literature is facially and inferentially totally inapplicable to the conduct in which Ater desires to engage.[4]

Ater concedes both that the Commonwealth of Kentucky may ban all pedestrian to motorist speech in the roadways

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[4]Note is again made to the procedural choice Ater made at the District Court level when he abandoned both his selective enforcement argument and his argument that the prohibition portion of KRS 189.570 did not apply to him.

and that it may, through a narrowly tailored restriction serving its legitimate governmental purpose, limit some but not all speech. See Petition at 6-7. Additionally, Ater concedes that Kentucky may limit both solicitation and distribution "because of the unique hazards posed by physical interaction between pedestrians and motorists." See Petition at 7 n. 4.

What Ater disputes is not that Kentucky properly excludes most pedestrians from standing in a public roadway, but that the activity in which he desires to engage is not an exception to that traffic regulation prohibition. KRS 189.570 would not prohibit Ater or anyone else with a proper warning device from standing in a public highway to solicit contributions. On the other hand, neither Ater nor anyone else may solicit a ride, nor a job from the occupant of a vehicle while standing on the roadway, nor hand out literature to passing motorists.

States are not required to empirically demonstrate objective effects of enactments of their legislative bodies. *Burson* v. *Freeman,* 112 S.Ct. 1846 (1992); *Munro* v. *Socialists Workers Party,* 479 U.S. 189 (1986). What is reasonable in any legislative situation is nearly always subject to empirical and philosophical attack. Evidence of this is found in the Court's strongly divided opinions in *Kokinda* and *ISKCON.*

Litter alone has been held to be a problem of leafletting not present in the alternative speech form of solicitation. See *Schneider* v. *State,* 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) cited in *International Society for Krishna Consciousness* v. *Lee,* 112 S.Ct. at 2714.

This Court noted in its dissent in *Lee* v. *International Society for Krishna Consciousness,* 112 S.Ct. 2709, 2710

(1992), that "leafletting presents risks of congestion similar to those posed by solicitation. It presents, in addition, some risks unique to leafletting." Noting that a regulation which permitted leafletting but prohibited solicitation could be more burdensome in terms of the monitoring required for mere solicitation, the dissent found that those who accept the material distributed to them might choose also to stop and engage the leafletter in debate, obstructing those who follow or might simply drop the distributed material, thus creating an eyesore, a safety hazard and an additional cleanup responsibility. *Id.* at 2710. The Court has, of course, previously ruled that aesthetic interests may provide a reasonable basis for restricting speech. *City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

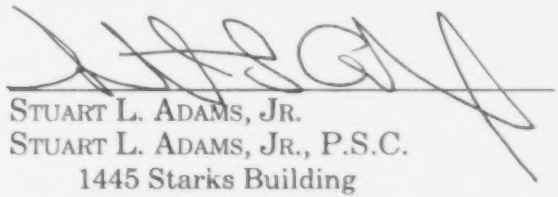
CONCLUSION

For the foregoing reasons, Ater's Petition should be denied. The opinion of the Sixth Circuit is in accord with the decisions of this Court. The Kentucky statute Petitioner challenges is undeniably content neutral and unrelated to the message conveyed. Having conceded its content neutral application to this factual situation, Ater is left only with an argument that the Kentucky General Assembly illogically excepted from its general prohibition a form of speech often subjected to closer scrutiny than some other forms.

Given the alternative channels of communication open for Ater under the statute, only inches away, and given the series of arguments by various members of this Court that there are logical objections to distribution of literature which are not present with the excepted solicitation subsection, Kentucky's statute passes constitutional muster. This Court

may safely deny the Petition, the Opinion of the Sixth Circuit being in conformity with the decisions of this Court.

Respectfully sumbitted,



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APPENDIX

K.R.S. 189.570 Pedestrians

(1) Pedestrians shall obey the instruction of any official traffic control devices specifically applicable to them, unless otherwise directed by a police officer or other officially designated persons.

(2) Pedestrians shall be subject to traffic and pedestrian control signals as provided in KRS 189.231 and 189.338.

(3) At all other places, pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in this chapter.

(4) When traffic control signals are not in place or in operation the operator of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

(5) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection, to permit a pedestrian to cross the roadway, the operator of any other vehicle approaching from the rear shall not overtake and pass the stopped vehicle.

(6) (a) Every pedestrian crossing a roadway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right of way to all vehicles upon the roadway.

(c) Between adjacent intersections within the city limits of every city at which traffic control signals are in operation, pedestrians shall not cross at any place except in a marked crosswalk.

(d) Notwithstanding other provisions of this subsection or the provisions of any local ordinance, every operator of a vehicle shall exercise due care to avoid colliding with any pedestrian and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing a child or an obviously confused or incapacitated person upon a roadway.

(7) No vehicle shall at any time be driven through or within a safety zone.

(8) The operator of a vehicle shall yield the right of way to any pedestrian on a sidewalk.

(9) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard.

(10) No pedestrian shall cross a roadway intersection diagonally unless authorized by official traffic control devices; and, when authorized to cross diagonally, pedestrians shall cross only in accordance with the official traffic control devices pertaining to such crossing movements.

(11) Pedestrians shall move, whenever practicable, upon the right half of crosswalks.

(12) Where a sidewalk is provided and its use is practicable, it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.

(13) Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway.

(14) Where neither a sidewalk nor a shoulder is available, any pedestrian walking on or along a highway shall walk as near as practicable to an outside edge of the roadway, and, if on a two-way roadway shall walk only on the left side of the roadway.

(15) Except as otherwise provided in this chapter, any pedestrian upon a roadway shall yield the right of way to all vehicles upon the roadway.

(16) A pedestrian who is under the influence of alcohol or any kind of drug to a degree which renders himself a hazard shall not walk or be upon a highway except on a sidewalk.

(17) No pedestrian shall enter or remain upon any bridge or approach thereto beyond the bridge signal, gate, or barrier, after a bridge operation signal indication has been given.

(18) No pedestrian shall pass through, around, over, or under any crossing gate or barrier at a railroad grade crossing or bridge while such gate or barrier is closed or is being opened or closed.

(19) No person shall stand in a roadway for the purpose of soliciting a ride.

(20) No person shall stand on a roadway for the purpose of soliciting employment or business from the occupant of any vehicle.

(21) No person shall stand on a highway for the purpose of soliciting contributions unless such soliciting is designated by the presence of a traffic control device or warning signal or an emergency vehicle or public safety vehicle as defined in KRS 189.910 making use of the flashing, rotating or oscillating red, blue, or yellow lights on such devices or vehicles.

(22) No person shall stand on or in proximity to a street or highway for the purpose of soliciting the watching or guarding of any vehicle while parked or about to be parked on a street or highway.

(23) Upon the immediate approach of an emergency vehicle equipped with, and operating, one or more flashing,

rotating, or oscillating red or blue lights, visible under normal conditions from a distance of 500 feet to the front of such vehicle, and the operator of which is giving audible signal by siren, exhaust whistle, or bell, every pedestrian shall yield the right of way to the emergency vehicle.

(24) This section shall not relieve the operator of an emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway nor from the duty to exercise due care to avoid colliding with any pedestrian.